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# Lucky Seven Rodeo Corporation, a Utah corporation v. Pat Clark : Reply Brief

Utah Supreme Court

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STATE COURT OF APPEALS  
BRIEF

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DOCKET NO. **88-0079-CA**

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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LUCKY SEVEN RODEO CORPORATION,	:	
a Utah corporation,	:	APPEAL FROM THE JUDGMENT
	:	OF THE DISTRICT COURT,
Appellant,	:	FIFTH JUDICIAL DISTRICT,
	:	WASHINGTON COUNTY
vs.	:	
	:	
PAT CLARK,	:	Case No. 860067
	:	Classification: 13b
Respondent.	:	

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**88-0079-CA**

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**FILED**

DEC 29 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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POINT I  
LUCKY SEVEN APPEALS FROM A SUMMARY JUDGMENT  
WHICH IS NOT SUPPORTED BY FINDINGS  
ENTITLED TO A PRESUMPTION OF VALIDITY.

The Respondent's brief is noteworthy in two respects. First, it totally fails to respond to any of the Appellant's issues raised on appeal, and second, it lacks any citation to the record to support any of its assertions.

The Respondent's brief appears to be based upon the assumption that the lower Court's Summary Judgment is grounded on findings of fact. (Respondent's Brief P. 7) Clark, further, argues that the trial court's pivotal rulings, or so called findings, that the "sole purpose" of the easement was to maintain and operate a dike and reservoir, and that other uses of the easement were "predicated" on the continued use of the property as a dike and reservoir, are supported by the record. (Respondent's Brief P. 8) Clark's brief, however, glosses the critical fact that Lucky Seven is appealing from a Summary Judgment, and not from a judgment entered after trial in which the finder-of-fact might have weighed the evidence and entered findings. Clark's brief ignores Lucky Seven's argument that because the intents and reasons of the parties for granting the easement are disputed, these questions could not be properly resolved by Summary Judgment. Owen v. W. H. Westerhaus, 224 Kan. 42, 578 P.2d 1102 (1978).

Clark alleges that the trial court made certain findings which are entitled to an inference of validity. (Respondent's

brief, P. 7-8) While Lucky Seven does not dispute that findings are entitled to an inference, Lucky Seven urges that the rule is inapposite in this case.

A review of the record shows that no findings entitled to an inference of validity were entered. The original lawsuit, tried in December, 1984, was resolved by Stipulation. Subsequently the Court entered an Order and Judgment. No findings of fact were entered. In 1985, Pat Clark filed a Motion for Summary Judgment alleging conduct inconsistent with the easement and alleging an abandonment thereof. (R. 180) Lucky Seven filed an Affidavit in opposition to the Motion admitting removal of a dike and reservoir, but denying any intent to abandon the easement, or that the easement required that the property be used as a dike and reservoir. (R. 186-190) The Affidavit also admits the removal of a fence, but alleges that the fence was on Lucky Seven's property, and denies that the particular fence removed was a fence required to be maintained by the Order and Judgment.

When the lower court ordered Summary Judgment for Clark, Lucky Seven requested Findings. While findings are not necessary on Summary Judgment (Rule 52, URCP), the trial court had previously expressed its intent to enter Summary Judgment, therefore, Lucky Seven desired that the Court articulate the nature of any ambiguity it had found in the Order and Judgment, and also describe what evidence the Court had relied upon to find an intent to abandon. (R. 207-209). Lucky Seven urges that these

so-called findings are not entitled to presumption of validity since the trial court was not procedurally in a position to weigh the disputed factual questions on Summary Judgment.

In 1986, two years after trial, and without the benefit of a transcript, the District Court stated that according to his recollection, the sole purpose of the easement was to enable Lucky Seven to maintain and operate the dike and reservoir for the benefit of abutting agricultural property. The statement has been characterized as a Finding. The so-called finding is disputed by the Affidavits on Summary Judgment. (R. 186-190)

In his brief Clark attempts to justify trial court's ruling that the purpose of the easement was to maintain and operate the dike and reservoir, claiming that the Court made its finding based on its knowledge of the facts and evidence presented at trial. (Respondent's Brief, P.7) Curiously, however, the brief makes no reference to the transcript of the trial to support the Court's knowledge. Obviously, there is no reference to the trial transcript in Clark's brief because there is no support in the transcript for such a statement. The trial court could not have gotten its "sole purpose" or sole reason idea from the transcript, because it does not exist therein. Rather, the evidence at trial supports multiple uses and purposes for the easement property. At trial, Clark's counsel even attempted to minimize the necessity for use of the property for irrigation purposes which Respondent now claims was the sole purpose of the grant of easement. (R. 127:2-19)



Clark's brief makes the equally unsupported and erroneous statement that the 1986 Findings are set forth in the 1984 Order and Judgment. (Respondent's Brief, P. 7) Again, there is a glaring paucity of any citation to the record. The Order and Judgment says nothing about the purposes of the easement, nor does the Order and Judgment state or imply that the easement was granted solely to allow operation of a reservoir and dike as the District Court later said in 1986. Rather, multiple purposes and uses, including agricultural uses, are specifically authorized.

On Summary Judgment Clark claimed that Lucky Seven was required to continue to operate a dike and reservoir. Lucky Seven, for its part, denied this intent, and alleged that many alternative uses were intended to be permitted. (R. 186-190) Had there been a trial, the Court could have weighed the evidence, entered a judgment and made findings. However, Summary Judgment should have been denied, since the intentions and understandings of the parties were material and disputed. The Court's so called "Findings" on the basis of disputed Affidavits, are not entitled to any inference of validity.

#### POINT II

#### IT IS A DISPUTED MATERIAL FACT WHETHER LUCKY SEVEN REMOVED ANY FENCE REFERRED TO IN THE ORDER AND JUDGMENT

Paragraph 3 of the Order and Judgment (R. 157) states that the Plaintiff, Lucky Seven, had a duty to "maintain the fences enclosing the area hereinabove described." Obviously,

particular fences were contemplated to be maintained.

Pat Clark alleges that the fences enclosing the easement area have been removed. Clark also alleges that this "fact" is uncontroverted. (Respondent's Brief, P.4)

In his Affidavit in opposition to Summary Judgment Lucky Seven's president, Russel Walter, stated:

13. There are several fences which could be interpreted as enclosing the easement property.
14. Two such fences are located on the boundary of Defendant's property. One of these fences separates Defendant's property and the easement property.
15. The Plaintiff has removed a third fence, which fence was located on the Plaintiff's property, and not on the disputed property. Said fence is not part of the easement.
16. The fence removed by the Plaintiff does not demark any meaningful boundary or control cattle, and has no function or use, but presents an obstruction to the Plaintiff's use of the property.

There is no dispute that Lucky Seven removed a fence on its own property. However, there is a material factual dispute whether the fence removed is one of the fences enclosing the easement area to which the Order and Judgment refers. It is disputed whether Lucky Seven had an obligation to maintain the removed fence. Lucky Seven alleges that the fence removed is on Lucky Seven's property, is not one of the fences enclosing the easement and served no purpose. Obviously, the Order and Judgment does not require maintenance of every fence, but only

specific fences enclosing the easement area. The identity of the fence removed is in issue and should have been determined by trial rather than Summary Judgment.

**POINT III**

**THERE IS NO EVIDENCE OF A PERMANENT OBSTRUCTION  
OF THE EASEMENT WARRANTING THE RULING OF ABANDONMENT.**

There is no dispute that Lucky Seven removed an earthen dike on the easement property. Lucky Seven argued in it's brief that Lucky Seven's admitted conduct in preparing the easement for planting, an agricultural purpose, was consistent with the approved uses of the easement. Further, Lucky Seven argued that in spite of its admitted removal of the dike, there was no clear or unequivocal evidence of an intent to abandon the easement. Timpanogas-Hiland, Inc. v. Harper, 544 P.2d 481, (Utah 1975). Pat Clark's brief fails to address either of these issues.

Pat Clark argues in his brief that Lucky Seven's removal of the reservoir and dike is evidence of an intent to abandon the easement. According to Clark, Lucky Seven's conduct permanently obstructs the use of the easement and displays an intent to destroy the easement. Clark's brief, however, candidly admits that it must be "assumed" that removal of the dike and reservoir is a permanent obstruction of the easement. (Respondent's Brief, P.10) There is no testimony or evidence in the record that removal of the earthen dike or reservoir by Lucky Seven created any permanent obstruction to the use of the easement.

There is evidence and testimony in the record that the configuration of the dike and reservoir had changed over time, and that removal or alteration created no permanent impediment. Russ Walter testified he had built a smaller dike and pond inside the larger major pond area, and was apparently using the same at the time of trial. (RT. 33:18-19; 34:10-15) This smaller pond did not utilize the dike which was later removed. Thus, a pond for irrigation or other purposes had been, and could in the future, be created on the easement property even though the dike previously part of the larger pond had been removed to accomodate planting. Lucky Seven alleged in its Affidavit in Opposition to Summary Judgment, that a "reservoir could still be maintained on the property, should the Plaintiff so elect to use the property. Plaintiff does intend to construct a smaller pond for Plaintiff's stock watering purposes on the property at a future date." (R. 187, Paragraph 7). There is no evidence that the removal or construction of an earthen dike and pond has any permanent consequences on the use of the easement. There is evidence that the contrary is true.

The Stipulation of the parties contemplated the construction of a pipeline for pressurized irrigation of Lucky Seven's abutting agricultural property. (R. 153, ¶ 4). This pipeline was to be constructed by and was to belong to Lucky Seven, and would not benefit Pat Clark. (R. 180, ¶ 12) The Appellant alleges that Clark was aware and understood that upon installation of a pipeline the alternative use of the easement

for a dike and reservoir would be eliminated, leaving only alternative uses. (R. 187, ¶ 6) This pipeline has been constructed. It is located where the larger irrigation pond had previously been. The contemplated construction of this pipeline further emphasizes the intent of the parties that the easement have multiple uses, and underscores the intent of Lucky Seven to relocate a pond on the easement as stated in its Affidavit.

Appellant thus disputes that the removal of the earthen dike created any permanent destruction of the purposes of the easement, and further alleges that it, in fact, intended to create a pond on the easement area. Thus, the Respondent's "assumption" that the removal of the dike and reservoir is a permanent obstruction is not supported by the record, but is a disputed issue of fact which should have been reserved for trial.

**POINT IV**  
**LUCKY SEVEN'S REMOVAL OF THE DIKE AND RESERVOIR**  
**IS NOT CLEAR AND CONVINCING EVIDENCE OF AN**  
**INTENT TO ABANDON THE EASEMENT**

The Respondent's brief alleges that removal of the dike and reservoir on the easement property is sufficient evidence to find an abandonment. Respondent cites Harmon v. Rasmussen, 13 Utah 2d 422, 375 P.2d 762 (1962). The Harmon case is instructive and should be closely reviewed. In Harmon the Rasmussens, landowners, alleged that Harmons had abandoned a prescriptive easement for a ditch over the Rasmussen property. The evidence supporting abandonment came from two neighbors who alleged that

they had lived in the area for six years, but had seen no water running through the ditch at any time. There was also testimony that Harmon had piled dirt in the North branch of the ditch around the headgate to prevent the water from being turned into the ditch by children removing the headgate board when the water was not wanted in the ditch. After reviewing these facts, this Court stated that "proof of abandonment of such an easement requires action releasing the ownership and the right to use with clear and convincing proof of an intentional abandonment. This requires that Plaintiff ceased to use this easement to irrigate their land with the intention to make no further use of it." Id. at 765. See also Brown v. Oregon Short Line Railroad Company, 36 Utah 257, 102 P. 740 (1909).

Lucky Seven urges that there is no clear and convincing proof of an intent to abandon the easement and make no further use of it. Lucky Seven clearly believed that it had the right to use the property for agricultural purposes, including planting, which had been a historical use of the property. (RT. 34:17-20) Lucky Seven removed an earthen dike and reservoir, which configuration had been previously altered and changed (RT. 34:14-15), and alleged that it intended to later construct another smaller pond on the easement property. (R. 186-190) The test established by the Harmon Court was whether owner of the easement had indicated by its conduct, clear and convincing intention to make "no further use" of the easement. There is no evidence in this case that Lucky Seven intended to make no further use of the

easement. On the contrary, Lucky Seven intended to use the easement for agricultural purposes, but further expressed an intent in its Affidavit in Opposition to Summary Judgment to construct a new pond on the easement property. Neither the evidence in the record of the trial or the Affidavits of the parties in response to the Motion for Summary Judgment supports the allegation that there is any clear or convincing evidence that Lucky Seven intended to make no further proper use of the easement property.

**POINT V**  
**TERMINATION OF THE EASEMENT IS EXCESSIVELY HARSH**  
**AND OPPRESSIVE IN THE CIRCUMSTANCES.**

Lucky Seven believes that when viewed in light of all of the circumstances, the Court's termination of the easement for its conduct, even if a breach of the easement agreement exists (which it denies), was punitive and inappropriate.

A brief summary of the circumstances that suggest a more appropriate resolution is warranted. Lucky Seven reasonably believed that the language of the easement allowed an agricultural use in planting. (R. 188, ¶ 9-10) When this interpretation was disputed, Clark sought a judicial interpretation of the easement. Instead of an interpretation with clarifying or remedial orders, the Court entered Summary Judgment.

There is no evidence that the removal of the earthen reservoir created any permanent or serious obstruction that could

not have been remedied had the trial Court merely clarified the permitted uses of the easement and instructed Lucky Seven accordingly.

There is no evidence in the record of any damage or disadvantage flowing to Pat Clark as a result of Lucky Seven's use of the property. The maintenance of the reservoir, when filled with water, was to irrigate Lucky Seven's land, not Pat Clark's land. Pat Clark would not benefit from this use since he had no water and did not have the right to store water in the reservoir in any event. (R. 188, ¶ 12)

Since Clark could not be damaged, there was no reason that the trial Court could not have interpreted the easement and made remedial orders. A more appropriate solution would have been entry of an appropriate order requiring restoration of the dike, supported by an Order to Show Cause why an injunction should not thereafter be ordered or damages. The entry of an order terminating the easement under these circumstances, however, offends justice and equity and should be reversed.

#### CONCLUSION

The issues raised by Lukcy Seven's appellate brief have two primary thrusts. First that the Consent Order and Judgment entered in 1984 expressly permitting alternative uses of the easement property does not require that the property be used as a reservoir and dike. Secondly, the intents of the parties regarding the use or abandonment of the easement are all disputed by



the Affidavits offered on Summary Judgment, thereby making a Summary Judgment inappropriate as a matter of law. Respondent has not addressed the issues raised by Lucky Seven's brief.

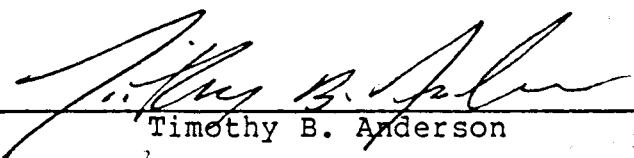
Clark chooses to ignore the issues raised by Lucky Seven as well as the clear language of the Order and Judgment. Instead, Clark relies wholly on the unsupported recollections and pronouncements of the District Court made two years later.

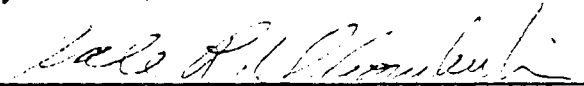
The Respondent's argument that removal of the dike and reservoir creates a permanent obstruction to the easement is founded on unsupported "assumptions" and should be rejected.

The argument made in the Respondent's brief that deference should be given to the lower court's findings would be appropriate had this matter gone to trial in 1986. However, where Summary Judgment was entered the reverse is true, and all inferences and deference should be given to the party against whom Motion for Summary Judgment was made. Under all of the circumstances and the language of the Consent Order and Judgment, termination of the easement is an unfair and excessively harsh remedy which should be reversed.

DATED this 18th day of December, 1986.

JONES, WALDO, HOLBROOK & McDONOUGH

  
\_\_\_\_\_  
Timothy B. Anderson

  
\_\_\_\_\_  
Dale R. Chamberlain

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CERTIFICATE OF SERVICE

I do hereby certify that on this 19th day of December, 1986, I served four copies of the Appellant's Brief in Case No. 860067, Utah Supreme Court, on Phillip L. Foremaster, Counsel for Pat Clark.

JONES, WALDO, HOLBROOK & McDONOUGH

  
\_\_\_\_\_  
DALE R. CHAMBERLAIN